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No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1946

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 290–301) [1] and dissenting (R. 301–309) opinions in the circuit court of appeals are reported at 153 F. 2d 176.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1945 (R. 310), and a

[1] Pursuant to stipulation, the printed record consists of petitioners' printed appendix to their brief in the court below and the proceedings in that court. References to the printed record are designated "R." That record contains the bill of exceptions in abridged form. The stipulation provides that either party may refer to the certified stenographic transcript of the record on appeal below, including the original exhibits (R. 319–320). This transcript and the exhibits have been forwarded to this Court by the clerk of the court below. References to the transcript are designated "Tr."

petition for rehearing (R. 311–317) was denied January 26, 1946 (R. 318). The petition for a writ of certiorari was filed March 4, 1946, and was granted April 22, 1946 (R. 319). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the cause is moot as to petitioner Fiswick.

2. Whether, in petitioners' trial for conspiracy to defraud the United States, it was reversible error to permit the jury to consider as evidence against each petitioner statements made by the others to F. B. I. agents narrating the makers' participation in the conspiracy.[2]

STATUTES AND REGULATIONS INVOLVED

The conspiracy statute (Section 37 of the Criminal Code; 18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in

[2] This question is the only one which was presented by the petition for a writ of certiorari. Petitioners in their brief on the merits urge several additional questions. In respect of these the Government's position is that petitioners should not be permitted to have the benefit of a review of these questions. We discuss this matter, as well as the questions, at pp. 54–60, *infra*.

any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Alien Registration Act, 1940 (Act of June 28, 1940, c. 439, Title III, 54 Stat. 670, 673–676; 8 U. S. C. 451–460), are:

SEC. 31. (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30 [registration of aliens seeking visas to enter the United States], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

* * * * *

SEC. 33. (a) All applications for registration and fingerprinting under section 31 shall be made at post offices or such other places as may be designated by the Commissioner [of Immigration and Naturalization].

* * * * *

SEC. 34. (a) The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this title. Such forms shall contain inquiries with respect to (1) the date and

place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.

SEC. 36. * * *

(c) Any alien * * * who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; * * *.

Regulations governing the registration of aliens under the Alien Registration Act, 1940, were issued by the Acting Commissioner of Immigration and Naturalization on August 8, 1940, with the approval of the Attorney General (see 5 F. R. 2836–2841). The relevant regulations were:

§ 29.3 (a) Registration shall commence on August 27, 1940. Any person in the United States on that date who is required to register and be fingerprinted, or to register, may do so at any time on or before December 26, 1940.

* * * * *

§ 29.4 (l)(10) The alien, if fourteen years of age or older, shall state any activities in addition to his occupation in which

he is, has been within the past five years, or intends to be engaged. The alien shall list the names of all clubs, lodges, groups, organizations, or societies to which he belongs or in which he participates. If the alien holds any office or official position in any of these clubs, lodges, groups, organizations, or societies, he shall so state.

* * * * *

§ 29.4 (l)(15) The alien, if fourteen years of age or older, shall state whether, during the past five years, he has been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. If the alien has been affiliated with or active in any such groups or organizations, he shall list them. If he holds an office or official position in any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such groups or organizations.

The "harmless error" statute (Section 269 of the Judicial Code, as amended; 28 U. S. C. 391) provides:

* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without re-

gard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

STATEMENT

A single count indictment was returned against petitioners and 28 others in the District Court for the District of New Jersey on September 13, 1944, charging the defendants with conspiring to defraud the United States, in violation of Section 37 of the Criminal Code, *supra*, pp. 2–3 (R. 1, 7–16). The indictment charged that the defendants continuously between September 1, 1939, and the date the indictment was returned conspired with each other and with Friedhelm Draeger, Hans Vogel and Fritz Zeglin, with the German Ambassador to the United States and members of his staff, and with other representatives of the Third German Reich, to defraud the United States of its governmental function of securing a "full and complete listing * * * of all aliens residing * * * within the United States, their * * * activities therein, * * * membership in and affiliation with any * * * organizations devoted to furthering the political activities, public relations and public policy of foreign governments, and their participation in the meetings and activities of such * * * organizati[redacted]" (R. 8).

The indictment alleged that during the summer of 1941, and for five years prior thereto,

Draeger, had been the German consul in New York City and leader of the "overseas portion" of the Nazi Party in the United States; that during the same period Vogel, in his capacity as Draeger's secretary, was engaged in matters concerning the operation and conduct of the Nazi Party and its members and activities in the United States; and that since 1933 the United States portion of the Party was an organization devoted to furthering the political activities and policy of the German Reich (R. 8–9). It was further alleged that during the five years preceding the fall and early winter of 1940, each of the defendants was a German national residing in the United States and a member of and affiliated with the Party; that as a part of the conspiracy, Draeger, Vogel, and the German Ambassador would direct the defendants, in registering under the Alien Registration Act, to conceal and to falsify their connection with the Nazi Party and that the defendants would accept such directions; and that the defendants would continue after the fall and early winter of 1940, "and from day to day thereafter," to misrepresent to the United States, "their agencies, departments and bureaus," their connection with and activities in the Nazi Party to the end that the defendants' concealments and misrepresentations made in connection with their registration under the Alien Registration Act would continue to prevent the

United States "during a National emergency" from obtaining complete and accurate information relating to the "membership, policy and activities of these defendants and others in the said Nazi Party in the United States, * * * all of which said information in said form under said Act of Congress was vital to the internal security of the United States" (R. 9–11). The indictment alleged that as a means of accomplishing the conspiracy the individual defendants would appear for registration and in registering would falsely and fraudulently fail to disclose their connection with and activities in the Nazi Party in the United States (R. 11).

The indictment set forth forty overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 12–16). A large number of the overt acts related to instructions given by Draeger and Vogel to the defendants from September to December, 1940, in connection with registering under the Alien Registration Act;[3] a number of others related to the defendants registering under the Act in November and December, 1940.[4] The last overt act alleged to have been committed by any of the convicted defendants was the filing by petitioner Mayer on December 23, 1940, of his alien registration form (No. 18, R. 14).

[3] See Nos. 2, 3, 6–8, 10, 13, 17, 19, 20, 22, 32, 35, 39.

[4] See Nos. 9, 11, 14, 16, 18, 21, 23, 24, 26–28, 31, 33, 36, 40.

After a jury trial,[5] petitioners were convicted (R. 5):[6] petitioners Fiswick and Rudolph were each sentenced to imprisonment for eighteen months and petitioner Mayer to imprisonment for a year and a day (R. 6). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgments of conviction were affirmed (R. 290–301), one judge dissenting (R. 301–309).

The evidence may be summarized as follows:[7]

Draeger, whose office was at the German Consulate in New York City, was the New York district leader of the Nazi Party in the United States. (R. 17, 20, 58–59, 83–84; see also Gov. Ex. 10, p. 9, Tr. 397; Gov. Ex. 18, 19, 21–35, Tr. 400). Vogel was Draeger's secretary; his work was "in connection with the activities of the Nazi Party" (R. 18, 20, 59, 84). Lilly Ilfian was employed by the German Consulate in New York City as a stenographer from March, 1939, to May, 1941 (R. 17, 58). She worked under Vogel's direction, taking care of matters pertaining to the Party (R.

[5] Six of the defendants pleaded guilty (R. 3–4); the indictment was dismissed as to another defendant (R. 5). Of the remaining twenty-four defendants, the case was severed as to fourteen (R. 3). Of the seven defendants, in addition to petitioners, who were tried in this case, the jury acquitted three and disagreed as to the other four (R. 5).

[6] The facts relating to the question whether the cause is moot as to petitioner Fiswick are set forth in the Argument, *infra*, pp. 33–37.

[7] In Gov. Ex. 18, for example, Draeger described himself as "Consul and District Leader of the Foreign Organization of the NSDAP."

18–22). Gustave Gauerke was a clerk in the commercial department of the German Consulate in New York City (R. 83). Emil Wilhelm Borchers, one of the defendants as to whom the case was severed, was a member of the Nazi Party in the United States. He had applied to Draeger for membership in 1935, telling Draeger that when he was in Germany he had been told to go to the Consulate on returning to the United States. (R. 87–88.) Illian, Gauerke, and Borchers were Government witnesses (R. 16–102).

Miss Illian testified that applications for membership in the Nazi Party were received at the office of the Consulate and that they were accepted by Vogel (R. 22). The application form stated: "I promise to give the Fuehrer unconditional obedience and as a loyal follower of the Fuehrer to serve the Party with all my strength" (Gov. Ex. 2, R. 271). Applications for membership were sent to Germany with a report by Draeger (R. 22). Applicants for membership were called "Parteianwaerter", and they received a "Parteianwaerter" or "prospective member" card which was issued at the office of the Consulate. Anwaerters retained their cards until they received membership cards or books which came from Germany. (R. 26, 62, 81.)

Miss Illian testified that she collected dues and that anwaerters and those who had received their cards from Germany paid the same amount; that anwaerters were required to pay dues as soon

as they had filed their applications for membership (R. 21, 64, 83). She also testified that invitations to festivities held under the auspices of the German Consulate were sent not only to those who had received their membership cards but also to anwaerters (R. 39, 43).

Miss Illian testified that there was kept in the office of the Consulate a card file of members of the Party and applicants for membership (R. 24, 37, 66). In the early part of 1940 she and another stenographer prepared from this file a list of members of and applicants for membership in the Party. The list bore the legend: "List of Persons who have applied for Passports." Each petitioner's name appeared on the list. (R. 36–37, 40, 42, 66; List, Gov. Ex. 17, Tr. 399.)* Shortly after the list was prepared the card file disappeared. Miss Illian testified that before the file disappeared Vogel told her that the "file cards are going to be destroyed" (R. 40, 42, 67).

In August or September, 1940, at Vogel's direction, Miss Illian sent a form letter signed by Draeger to the persons whose names appeared on the list, including the applicants for membership (R. 45–47, 67–68). This letter read as follows (Gov. Ex. 36, Tr. 400):

> I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

*The names on the list were arranged numerically; Fiswick was No. 449, Mayer, No. 230, and Rudolph, No. 612.

Vogel told Miss Illian to mail these letters in batches of 10 to 15 at a time (R. 69). She heard Vogel tell those who appeared in response to the letter that in registering under the Alien Registration Act they were "not to put the fact in that they were members of the National Socialist Party." He also told her that if he was not in when anyone appeared in response to the letter she was to give them the same instruction. (R. 51, 70–71.)

Item 10 on the Alien Registration Form read as follows (R. 266; see, *supra*, pp. 4–5):

> I am, or have been within the past 5 years, or intend to be engaged in the following activities:
>
> In addition to other information, list memberships or activities in clubs, organizations, or societies * * *.

Item 15 on the form read as follows (R. 266; see, *supra*, p. 5):

> Within the past 5 years I _____
> (HAVE, HAVE NOT)
> been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

Each petitioner registered under the Alien Registration Act in December, 1940. Fiswick and

Rudolph, in response to Item 10, stated "None"; Mayer stated "Reichedeutshe Vereingung. New York, N. Y." Each petitioner, in response to Item 15, stated "Have not" (Gov. Exs. 1–F, 1–G, 1–H, R. 265–270).

After some persons had been given instructions not to disclose their membership in the Party in registering, Vogel prepared a second instruction in respect of the information to be given by members in registering. He dictated the wording of it to Miss Illian and told her to give it to members who came in while he was out. (R. 48–50, 51, 72.) This instruction read as follows (Gov. Ex. 37, Tr. 401):

> Under "additional information" insert:
> I am a non-resident member of the National Socialistic German Labor Party in the United States since ----------.
> No activities in the United States.
> (Question 15—have not ----------.)

Vogel also gave Miss Illian a list of names of those who had registered before they received the second instruction (R. 50–53; Gov. Ex. 38, Tr. 402). These persons were to receive a form letter which they were to send to the "State Department" amending their answers to Items 10 and 15 in the Alien Registration Form (R. 52–53). This form letter, addressed to the "United States Department of Justice, Immigration and Natural-

ization Service, Alien Registration Division," read as follows (Gov. Ex. 39, Tr. 402; see R. 53):

> I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions Nos. 10 and 15, that these questions referred to present activities.
>
> However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since ----------, but have not been actively engaged in any way in said party, or on its behalf, and am not engaged in political activities in this country.[9]

Gauerke, who for some weeks in the fall of 1940 was on duty at the Consulate between 5 p. m. and 10 p. m., testified that during that time groups of men numbering from 10 to 15 called at the Consulate to see Draeger. He subsequently inquired of Vogel whether the reason for these visits was to tell "these Party members coming here at night that they should fill in the questionnaire as an alien * * * [that] I am a member

[9] The record contains amendatory letters by defendants Burchardt and Ulrich (Gov. Exs. 1B and 1D, Tr. 38). There is nothing in the record to indicate that petitioners received the form letter or that any of them filed an amendatory statement.

of the Reichsdeutschevereinigung,[10] and he said yes" (R. 84–86).

Borchers, a Party member, testified that in September, 1940, Vogel told him that "when they went to register they were not to state that they were organized [as] the Nazi Party" (R. 93). There were three others present at this time (R. 95). Vogel also instructed him to turn in his Party membership book; "otherwise he would come in trouble" (R. 94).

There were introduced certain oral and written statements each petitioner made to agents of the F. B. I. in 1943 and 1944. Petitioner Mayer was interrogated by an F. B. I. agent on November 22 and 23, 1943 (R. 105–106). The agent testified that in the interrogation of November 22, 1943, he asked Mayer about his membership in the Nazi Party "in this country" and that Mayer denied that he was a member (R. 113); that when he questioned Mayer the following day, Mayer said that he "might as well tell * * * the story"; that he applied for membership in the Party in early 1936 or early 1937; that in December, 1940, he turned in his membership card to

[10] This was an association of German nationals in the United States who, Gauerke stated, he believed "belonged to * * * the German Labor Front" (R. 86), although petitioner Mayer was told by Vogel to state, if questioned about the organization, that it was a "welfare organization." Mayer also stated that he had never heard of the organization and did not belong to it (*infra*, p. 16).

Vogel and Vogel told him not to list his membership in the Party in registering under the Alien Registration Act, and to state in answer to Item 10 "which pertains to a membership in organizations in this country", that he was a member of the Reichsdeutschevereinigung; that if he were questioned about that organization he was to say that it was a welfare organization; that Mayer stated he had never heard of that organization before and was not a member of it; that Vogel told him to answer Item 15 on the registration form, "Have not"; that he went to the Consulate on 8 or 10 occasions to pay dues; that in September, 1940, he was called to the Consulate, at which time there were present 10 or 15 other persons whom he assumed to be members of the Party, and that on this occasion Draeger asked whether those present desired to return to Germany, the majority, not including Mayer, indicating that they did, and that Draeger told the gathering that "they should continue to be loyal to the Party and to the Fuehrer, or some words to that effect"; that "they could become a member of the Nazi Party in this country even though they became citizens of the United States"; that the reason he had not disclosed his membership when he had been questioned the day before was that Vogel had told him not to disclose his membership (R. 113–120, 130–131). Mayer then signed a statement substantially similar to the verbal state-

ment (R. 119, 141–142, 153; Gov. Ex. 56, R. 272–273).

Petitioner Fiswick was questioned by an F. B. I. agent on April 29, 1944. At the outset of the interrogation the agent told Fiswick that "we wanted him to tell us the truth about his membership in the Nazi Party, and we would appreciate it if he would tell us at the time of that interview." Fiswick first said he was not a member or a prospective member of the Party, that he had so informed an Alien Enemy Hearing Board on January 7, 1944, and agents of the F. B. I. at an earlier interrogation (R. 155–156). Fiswick then stated that he desired to tell the truth and signed a statement in which he said that he had applied for membership in the Party in July or August, 1939; that he had filled out the application at the German Consulate in Vogel's presence; and that he had paid dues at the Consulate office until June, 1941, when that office was closed. In his application for membership he stated that he "recognized Adolf Hitler as the leader of the German Reich and * * * agreed to obey the laws of the German Reich." He also said that in 1940 he went to see Vogel in response to a notice; that Vogel told him and four other applicants that it would not be necessary for them in registering under the Alien Registration Act to state that they were members of the Party; that since he had not yet received his

membership book from Germany, he did not in registering state that he was a member of or affiliated in any way with the Party; that in registering he followed Vogel's instructions; that he had attended various Nazi Party festivals in New York; that in April or May, 1941, he attended a Party meeting at the German Consulate at which Draeger stated that the Consulate "was closing and that war was possibly coming, and that all of the members should obey the laws of the United States and that we should destroy our membership cards", and that he destroyed his membership card upon arriving home after this final meeting. (R. 154, 156, Gov. Ex. 65, R. 273–275.)

Petitioner Rudolph was questioned by an F. B. I. agent on November 17, 1943. The agent asked Rudolph "if he wanted to discuss some matters that he had told the Alien Enemy Hearing Board at the time that he was previously before the Board, which matters we had information about that he had not told the truth". Rudolph said that he had applied for membership in the Nazi Party in March, 1938, had received a dues card, and had paid dues until a month or two prior to Pearl Harbor; that in 1940, at the time of the alien registration, an official of the German Consulate told him at the Consulate that if he was questioned concerning his membership in the Party he was to deny such membership (R. 159–164). In a statement which he signed on the

same date, Rudolph reiterated the foregoing and further stated that he was advised by an official of the German Consulate in New York City to state on his alien registration form that he was not a member of the Nazi Party; that "if anything happened to just deny membership in the party"; that he had received a yellow book at the time he applied for membership, which he later burned; that he knew the "party and the German State to be one and the same." (Gov. Ex. 67, R. 159, 279–280). On September 5, 1944, Rudolph gave the F. B. I. another written statement (R. 159, 163). In this statement Rudolph retracted his earlier statement in so far as he had there said that in registering under the Alien Registration Act he had followed instructions in failing to disclose his Nazi Party affiliation or activities. He also said that he knew his answer to Item 15 was false but that the reason he had failed to make the disclosure was his fear that to do so "would hurt my family and that I would be interned"; that in filling out an alien enemy form on February 25, 1942, he did not disclose his affiliation with the Party for the same reason; that he acted in that manner "all of my own volition without anyone telling me how or why I should do so." He further stated that he had received invitations from the Consulate to some functions given by the Party but had only attended two social affairs, and that he had also

received propaganda material from the German Library of Information (Gov. Ex. 67A, R. 281–282).

The question of the admissibility of one petitioner's statements to the F. B. I. as evidence against the other petitioners was first raised in connection with petitioner Mayer's statements. At the beginning of the interrogation of the F. B. I. agent, petitioner Fiswick's attorney (R. 16) objected to having any statements by Mayer go into evidence against Fiswick (R. 106–107), and after some colloquy (R. 108–110) the trial judge ruled that if Mayer's statements were in the nature of an admission on his part they would be admissible as against him, and that "if the conversation took place after the expiration of the conspiracy, it will be admissible against him and can under no circumstances be used against the balance of the alleged conspirators" (R. 110; see also R. 112, 147). The statements were first admitted only as against Mayer (R. 153), and the same course was followed as to Fiswick and Rudolph with respect to their statements (R. 154, 159). However, at the close of the Government's case the trial judge ruled that each of these statements was admissible against each of the other co-conspirators (R. 165). The defendants excepted (R. 166). The trial judge stated (R. 165):

> Now, in order that there may be no mistake, a question has arisen which I conceive

to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there * * * is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all the statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators."

[11] It may be noted that after this ruling the trial judge, in connection with defendant Nauert, as to whom the jury later returned a verdict of not guilty (R. 5), granted a motion to strike from the evidence as to Nauert all statements made by co-defendants to the F. B. I. subsequent to May 7, 1942, on the ground that Nauert had been taken into custody on that date and had made a full and complete disclosure to the F. B. I. which supplied the deficiencies in his alien registration statement and terminated his connection with the alleged conspiracy; however, he allowed Nauert's statement to be used against him and, in addition, against the other defendants (R. 228–229; see also R. 242, 252).

Each petitioner took the stand in his own defense. The gravamen of Mayer's (R. 166–192) and Fiswick's (R. 214–225) defenses was that Vogel had explained to them that mere applicants for membership in the Nazi Party were not required to disclose that fact in registering. Rudolph's defense, in line with his statement to the F. B. I. on September 5, 1944 (*supra*, p. 19), was that he had never received any instruction from anyone not to disclose his Party connection in registering; that he had never talked to anybody at the Consulate in connection with registration and that nobody at the Consulate had advised him to deny that he was a member of the Party (R. 198–214).

In the course of his charge to the jury the trial judge stated (R. 239–240):

> There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and * * * I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of

> proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy.

The defendants excepted to the portion of the charge "with respect to the admission in evidence of the statements of the defendants and their binding effect upon the other defendants" (R. 249).

Later the jury returned to the court room and the foreman told the judge that they had a question about that part of the charge "where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals." In reply the judge stated (R. 253):

> Here is what I said, that the acts or admissions of each of the co-conspirators are admissible as evidence against all of the other co-conspirators provided you find that there was a conspiracy and that they were all in it. Of course, if you find that any particular individual defendant was not in this common agreement that the indictment alleges existed, then he would be immediately out of the situation.

The circuit court of appeals affirmed the judgments of conviction (R. 301, 310), one judge dissenting (R. 301). The majority opinion (R.

290–301) regarded the question of the admissibility of each petitioner's statements against the other petitioners as turning primarily upon whether there was a conspiracy which continued to the filing of the indictment as charged. The majority stated that that was the "problem which presents the real issue" (R. 296). The argument against a continuing conspiracy was that the last overt act which occurred was Mayer's registration on December 23, 1940, long prior to the giving of the statements (R. 298), and that all the proof showed was a concluded conspiracy with a continuing result (R. 296). The majority held, however, that as charged and as proved the scheme did not end with false registration. "The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter" (R. 298). The majority pointed out that "the three sets of admissions" were themselves evidence of this. Mayer, as late as November 22, 1943, and Fiswick, on April 29, 1944, denied their Nazi Party membership, and this was some evidence that they were still following the plan and furthering the conspiracy even though they admitted their membership finally. As to Rudolph, the jury could have concluded that he persisted in actively maintaining the conspiracy down to the extent of testifying at the trial that he had never received or followed registration

instructions, and so denying an earlier admission. These denials constituted "some proof of specific overt acts in furtherance of the plan conceived and partially executed in 1940" (R. 299). They were consistent with the charge of a continuing conspiracy from prior to 1940 to the date of the indictment (R. 299–300).

The majority also held that it could not be maintained that the necessary result of the F. B. I. statements and conversations "must be in destruction of the conspiracy." It said that while this might be one conclusion, the jury could also have inferred that Rudolph as late as the trial, Mayer down to November 22, 1943, and Fiswick until April 29, 1944, were still affirmatively aiding the scheme set out in the indictment; that the conversations of Mayer and Fiswick with the F. B. I. and their statements, and Rudolph's statement and his testimony at the trial, must be considered together, and that "When this is done all three groups can be reasonably interpreted to imply deliberate concealment of Nazi Party membership down to the mentioned dates. It is not difficult to accept the so-called confessions as part of the acts which furthered the conspiracy when it is remembered that as to Mayer and Fiswick, their confessions coupled with the immediately preceding denials and as to Rudolph, his trial repudiation of his confession all give some indication at least that there has been a continuing

affirmative fraud on the United States" (R. 300).[12]

The dissenting judge was of the view that if the Government failed to prove that the conspiracy was in continuation on September 5, 1944, the date of the last statement by Rudolph, it was error to permit any of the statements to be received in evidence against any other alleged conspirator, since it was well established "that if the conspiracy had been terminated prior to the date of the confession an admission or a confession by one conspirator, made after termination of the conspiracy, and, therefore, not in furtherance thereof, cannot be received in evidence against any other alleged co-conspirator unless the admission or confession was made in the presence of such other conspirator" (a situation not here involved). On this point the dissenting judge was of the opinion that since there was no proof of any overt act after December 23, 1940, the date Mayer registered, the Government failed to show a subsequent continuation of the conspiracy (R.

[12] On the hypothesis that the conversations with and the statements of petitioners, including Rudolph's testimony, were evidence of the continued functioning of the plan of not disclosing information and of giving false information, the majority held that there was no difficulty with respect to the statute of limitations, since the jury by its verdict obviously believed, as it was entitled to do, that it was dealing with a crime which continued "right into the trial itself" (R. 300–301). Such a rationale is not needed to save the prosecution from the statute of limitations (see footnote 26, *infra*, pp. 41–42).

302). He also found in this connection that there was no proof that either of the petitioners was at the time of registration, or ever had been, anything more than a non-resident member of the Nazi Party; and that since the Government's evidence showed that sometime prior to May, 1941, the German Consul, the *sine qua non* of the conspiracy, undertook to end the period of secrecy by advising all members of the Party to file an amended registration statement disclosing their true status, there was then an abandonment of the conspiracy to keep the Government from finding out who were members of the Nazi Party (R. 302–303).[13]

The dissenting judge was also of the view that the statements of petitioners to the F. B. I. could in no wise have been in furtherance of the conspiracy since they were each made to the F. B. I. "in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts as revealed by the confessions" (R. 302). It cannot "rightly be said that any complicity by either [petitioner] in the conspiracy had continued" beyond the making of the statements. "When these [petitioners] made their confessions to the F. B. I. they necessarily thereby terminated any part in a conspiracy to deprive the Government of the information revealed by such admissions" (R. 304).

[13] As to this, however, see footnote 24, *infra*, p. 40.

The dissenting opinion concluded that it was reversible error to admit "the confessions of the [petitioners] as against any [petitioner] other than the maker since it clearly appears that no confession was made either in the presence of another [petitioner] or in furtherance of the alleged conspiracy" (R. 309).

SUMMARY OF ARGUMENT

I

Since petitioner Fiswick has fully satisfied the sentence imposed on him, the cause is moot as to him and the writ of certiorari should be dismissed as to him. *St. Pierre* v. *United States*, 319 U. S. 41. While in the *St. Pierre* case the Court, in passing, stated that St. Pierre had not "shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied," and if the crime of which Fiswick stands convicted is one involving moral turpitude, he is mandatorily deportable, this should not under the circumstances prevent the case from being moot. The only ground of any substance urged for reversal is one which, if sustained, would result in the remanding of the case for a new trial and thus afford the Government the opportunity to obtain a proper conviction. This, however, Fiswick has prevented by electing to serve his sen-

tence. Obviously, under the provisions of the Fifth Amendment, he could not be retried since, having already served his sentence, he could not be resentenced. The result would be that he would escape deportation in the event of a reversal. Deportation should not be defeated in that fashion. While it may be that a holding that the case is moot might be considered harsh if the other petitioners secure a reversal and are subsequently acquitted, the harshness is the consequence of Fiswick's having chosen to serve his sentence rather than to apply for bail or to secure a stay of execution. Failure to follow the latter course ought not to be permitted to frustrate the deportation process.

II

The only question presented by the petition for a writ of certiorari was that it was reversible error to admit as against each petitioner statements which the other petitioners made to the F. B. I. in 1943 and 1944. The trial court and the majority of the court below ruled that these statements were properly admitted, the former on the theory that they were made during the course of a conspiracy which endured beyond the alien registration period in 1940 and were evidence of acts or a course of conduct which could be in furtherance of the conspiracy, and the latter on the theory that the statements themselves could be considered in furtherance of a continuing

conspiracy. The dissenting judge, on the other hand, concluded that the conspiracy did not continue beyond the registration period, and he further held that the statements could have been in no sense in furtherance of the conspiracy in that each was made to the F. B. I. in full revelation, termination, and frustration of a conspiracy the chief object of which had been the concealment of the same facts revealed by the statements. Petitioners argue that the conspiracy came to an end with the registration period and, hence, that none of the statements was admissible against anyone but its maker.

We do not consider the question of continuing conspiracy, so much discussed in the opinions below, because even if the conspiracy did continue after the registration period, we agree with the dissenting judge that the statements were not admissible against others than their makers, for the reason that they were in full revelation, termination, and frustration of the conspiracy. However, in our view, the error should be considered harmless under the test recently laid down in *Kotteakos* v. *United States,* Nos. 457 and 458, last Term, decided June 10, 1946, and consequently that it does not constitute ground for reversal.

A. When questioned by the F. B. I., both Mayer and Fiswick initially denied their connection with the Nazi Party. Almost immediately thereafter they made admissions to the F. B. I.

from which the jury could conclude that they were parties to a conspiracy to conceal their Party connections when registering in 1940. When Rudolph was interrogated by the F. B. I, he immediately admitted his part in the conspiracy, and it was not until nearly a year later that he retracted his admission in part. Revelatory of the part he had played in the scheme, each petitioner's statements constituted a termination by him of any further participation in the conspiracy and they were but narration of past events, utilizable against him as an admission against interest, but under well settled principles not against other conspirators.

The significance attributed by the majority below to Mayer's and Fiswick's preliminary denials and to Rudolph's retractions is, we think, without bearing on the question whether the statements of each were in destruction of a further participation in the conspiracy. The preliminary denials were but the natural expressions of those who did not want to reveal their crimes when confronted by Government investigators. Rudolph's retractions did not obliterate his earlier revelation. They, like Mayer's and Fiswick's trial explanations, merely presented matter which the jury was required to consider in determining whether or not the truth lay in the statements.

B. Appraising the error in the light of the criteria applied in the *Kotteakos* case to the problem of when error is harmful, we do not believe

that there is in this case any basis for real doubt that the error did not substantially influence the verdict. The dissenting judge, while holding that reversible error resulted, did not indicate in what respect petitioners were prejudiced. The only prejudice which petitioners articulate is either without foundation or is not real prejudice.

The record shows that the purpose of the introduction of the statements was to show the participation of each petitioner in the conspiracy. It is apparent from the statements themselves that each disclosed no more than the participation of its maker in the conspiracy. The statements were in substance identical. Since each petitioner admitted his own complicity, there was obviously no occasion for the jury to resort to the similar admissions made by the others. Furthermore, nowhere in the statements of any petitioner is there a single reference to any other defendant. Under these circumstances, there was nothing in the statements of one petitioner which the jury might reasonably be said to have utilized to establish the participation in the conspiracy of another petitioner. In analogous situations appellate tribunals have declined to reverse convictions.

III

In their brief on the merits petitioners have raised questions which were not presented by the petition for a writ of certiorari. We think that

under Rule 38 of this Court these additional questions should not be considered. While we discuss them, none of them, in our judgment, possesses any merit, and several, at least, are of a character which would not warrant further review on certiorari.

ARGUMENT

I

THE CAUSE IS MOOT AS TO PETITIONER FISWICK AND, THEREFORE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS TO HIM

Because of his conviction in this case Fiswick was sentenced to imprisonment for 18 months (R. 6). No fine was imposed. So far as appears from the record Fiswick, unlike Mayer and Rudolph, made no application for bail or took any other step to stay the execution of his sentence pending appellate proceedings. He apparently elected to commence service of his sentence immediately (see R. 6; Rule 5 of the Criminal Appeals Rules of May 7, 1934). Petitioners' brief contains the statement that Fiswick has served his sentence (Br. 5), and this is confirmed by the records of the Bureau of Prisons.[14] Under these circumstances we believe that the cause is

[14] The Bureau has advised us that its records show that Fiswick completed service of the full term of his sentence on June 19, 1946 (after the granting of certiorari), and that he was unconditionally released on that date. The United States Attorney has informed us that Mayer and Rudolph are still out on bail.

moot as to Fiswick and, therefore, that the writ of certiorari should be dismissed as to him. *St. Pierre* v. *United States*, 319 U. S. 41. As this Court said in that case (pp. 42–43):

> * * * the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. * * * The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or to restore to petitioner the penalty of the term of imprisonment which he has served.

The Court added (p. 43) that the moral stigma resulting from St. Pierre's conviction did not prevent the case from being moot.

However, the Court, in passing, stated that St. Pierre had not "shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied" (p. 43). The only future penalty or disability to which Fiswick alludes is that if his conviction is sustained he is "still subject to deportation if this conviction is on grounds involving moral turpitude" (Br. 5). It is true, as Fiswick indicates, that if his conviction in this case was for a crime involving moral

turpitude he is subject to deportation under the provision of 8 U. S. C. 155 that "any alien who * * * is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."[15] If it be assumed *arguendo* that a conspiracy such as is here involved, to defraud the Government by impeding it in one of its lawful functions, is a crime involving moral turpitude,[16] Congress has imposed as incident to Fiswick's conviction not only the penalty of imprisonment or fine, or both, but has prescribed in addition that he shall be deported. The only ground of any substance which he urges for a reversal is one which, if sustained, would result in the remanding of his case for a new trial.[17] Normally, in such a case, the Government would be in a position to proceed with the prose-

[15] The record indicates that Fiswick last entered the United States on June 28, 1937 (R. 265; see also R. 220). As the evidence shows, *supra*, the conspiracy was formed and was in process of execution shortly before the registration of petitioners under the Alien Registration Act in the latter part of 1940, and, hence, within five years of Fiswick's last entry.

[16] Compare *U. S. ex rel. Berlandi* v. *Reimer*, 30 F. Supp. 767 (S. D. N. Y.), affirmed, 113 F. 2d 429 (C. C. A. 2); *Guarneri* v. *Kessler*, 98 F. 2d 580 (C. C. A. 5).

[17] This ground is that it was prejudicial error to admit statements by Mayer and Rudolph to the F. B. I. against him. This is discussed in Point II, *infra*, pp. 37–54.

cution until it obtained a conviction free from reversible error. However, Fiswick, by choosing to serve his sentence, has prevented this Court from affording the Government the opportunity, which it otherwise would have had, of attempting to secure a proper conviction in the event of a reversal. Obviously, under the provisions of the Fifth Amendment, Fiswick could not be retried since, having already served his sentence, he could not be resentenced. Cf. *In re Bradley*, 318 U. S. 50, 52; *Miller* v. *Aderhold*, 288 U. S. 206; *Ex parte United States*, 242 U. S. 27; *Bergdoll* v. *United States*, 279 Fed. 404, 405–406 (C. C. A. 3), certiorari denied, 259 U. S. 585.[18] The result would be that if his conviction were reversed he could not be reconvicted even if guilty, and he would thereby escape deportation. By electing to serve his sentence he would thus have thwarted the Congressional policy of deporting aliens guilty of crimes involving moral turpitude. The Government ought not to be prevented from executing that policy because Fiswick elected to serve his sentence.[19]

It may be that a holding that the case is moot might be considered harsh if this Court reversed

[18] In the *St. Pierre* case itself this Court pointed out that "reversal of the judgment below cannot operate to undo what has been done * * *" (p. 42).

[19] Where a reversal would result not in a new trial but in a termination of the prosecution, the situation might be different. There the Congressional policy would not be thwarted, because the prosecution should never have been brought.

the convictions of the other petitioners and they are acquitted in a new trial. But if there is harshness, it is plainly the consequence of Fiswick's having chosen to serve his sentence rather than to apply for bail or to secure a stay of execution. His failure to follow a course which would have obviated a possible harsh result ought not in all fairness be permitted to frustrate the deportation process.[20] Clearly, if one of several defendants fails to appeal and the others obtain a reversal and are subsequently acquitted, the former may nevertheless be punished and deported. The situations are analogous.

II

WHILE IT WAS ERROR TO PERMIT THE JURY TO CONSIDER EACH PETITIONER'S STATEMENTS TO THE F. B. I. AS EVIDENCE AGAINST THE OTHER PETITIONERS, THE ERROR WAS NOT HARMFUL SINCE IT CANNOT REASONABLY BE SAID THAT IT SUBSTANTIALLY INFLUENCED THE JURY'S VERDICT

The only question presented by the petition for a writ of certiorari was that it was error to admit as against each petitioner statements which were made by the others to the F. B. I. Petitioners argue this question in their brief on the merits,

[20] In the event of a reversal as to the other two petitioners and their subsequent acquittal, it may be that Fiswick will be in a position to secure a pardon. In that event he would not be deportable. 8 U. S. C. 155, *supra*, provides that its provisions "respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned."

as well as other questions which were not raised by the petition for a writ of certiorari. Under these circumstances we address ourselves first to the question presented by the petition for a writ of certiorari, and deal briefly with the other questions, *infra*, pp. 54–60).[21]

Reserving to the jury the necessary factual determinations, the trial judge ruled that the written statements and verbal admissions of each petitioner to the F. B. I. were properly evidential not only as against him,[22] but against the other two petitioners, for the following reasons: the conspiracy continued until the date of the indictment; the admissions and statements were made during the continuance of that conspiracy by a then participant; they involved statements and admissions of activities done by a conspirator in furtherance of the object of the conspiracy; they were not admitted for the purpose of proving the conspiracy itself but simply to prove acts and a course of conduct which would be chargeable to the other conspirators because done in furtherance of the conspiracy's object (see, *supra*, pp. 22–23). The majority below sustained that rul-

[21] While we believe that the case is moot as to petitioner Fiswick for the reasons stated at *supra*, pp. 33–37, we nevertheless will deal with his case on the merits.

[22] We do not understand petitioners to question that each petitioner's statements were competent evidence against him, if there was proof *aliunde* of a conspiracy (see Br. 32). We submit that there was such proof. See footnote 30, *infra*, p. 49.

ing, directing its argument principally to the propositions that, as alleged, there was a continuing conspiracy affirmatively to maintain concealment of Nazi membership after the false registration, and that the three sets of admissions were part of the pattern of continued affirmative concealment, since each petitioner, years after the false registration, persisted in actively maintaining the conspiracy, Mayer and Fiswick as late as November 22, 1943, and April 29, 1944, respectively, denying initially in their interviews with the F. B. I. that they were members of the Nazi Party, and Rudolph as late as the trial itself insisting that he had not acted pursuant to instructions in registering falsely, and thus retracting an earlier admission to the F. B. I. Because of these considerations, to which the jury could give weight as supporting the idea of a continuing conspiracy, the jury was not required, the majority thought, to conclude that the petitioners' confessions to the F. B. I. were in destruction of the conspiracy.

The dissenting judge attacked the idea that the conspiracy ran beyond December 23, 1940, the date on which Mayer registered,[23] pointed to the German Consul's termination of the period of secrecy sometime prior to May, 1941, by advising members of the Party to file an amended registration certificate that they were non-resident members of the Party without activity in this

[23] He was the last of the convicted defendants to register.

country,[24] and held, further, that petitioners' statements to the F. B. I. could in no sense have been in furtherance of the conspiracy in that each was made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts revealed by the confessions.

In this Court petitioners' principal argument on this phase of the case is that the conspiracy did not survive the filing of the false registration statements in December, 1940, and hence that none of the statements of petitioners to the F. B. I., as well as similar statements by other defendants,[25] was admissible against anyone but the maker (Br. 26–38).

We do not think it advances the resolution of the question presented to give consideration to the problem much mooted below whether the con-

[24] We do not think that there is any basis for the dissenting judge's view. The indictment was framed on the theory that there was an active section of the Nazi Party in the United States, and the evidence supported this theory. It was, therefore, obviously misleading for those who were active members of the Party in the United States to state that they were non-resident members of a foreign party without activities in this country.

[25] The statements of the other defendants are not contained in the printed record but appear in the typewritten transcript. We are concerned here, however, only with petitioners' statements. The trial court instructed the jury that the statements of one defendant could be considered against another defendant only if it found that both were members of the conspiracy (R. 239, 253). The only defendants convicted were the three petitioners.

spiracy endured beyond the filing of the false registration statements in December, 1940,[28] because, in line with the dissenting judge, we cannot believe that even if it did, the written statements and verbal admissions of the petitioners could be considered in furtherance of the object of a continuing conspiracy. Rather, to use the language of the dissenting judge, they were "each made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief

[28] While the discussion in the opinions below as to whether the conspiracy continued beyond the filing of the false registration statements, was occasioned primarily by the problem whether petitioners' statements to the F. B. I. were made during the existence of the conspiracy, the majority below seemed also to think that it was necessary to hold that the conspiracy survived the registration period in order to save the prosecution from the statute of limitations (R. 300–301). The last utilizable overt act alleged to have been committed pursuant to the conspiracy, i. e., Mayer's registration, occurred on December 23, 1940 (*supra*, p. 8). The majority below undoubtedly had in mind the three-year period provided by 18 U. S. C. 582, the general statute of limitations as to criminal offenses, which period would have expired on December 23, 1943; the indictment was not filed until ~~December~~ September 13, 1944. However, by Section 1 of the Act of August 24, 1942, c. 555, 56 Stat. 747, "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate." On July 1, 1944 (c. 358, 58 Stat. 649, 667, 18 U. S. C., Supp. V, 590a) this section was amended in respect of the cases specified by further suspending the running of the statute of limitations until three years after the termi-

object had been the concealment of the same facts as revealed by the confessions." (R. 302.) We consequently are of the opinion that even under the theory of a continuing conspiracy utilized by the majority below, we cannot support the admission of the statements as evidence against those who did not make them.[27] However, it is our opinion that the error should be considered harmless under the test recently laid down by this Court in *Kotteakos* v. *United States*, Nos. 457 and 458, last Term, decided June 10, 1946, and consequently does not constitute ground for the reversal of the judgments of conviction.

A. *The admission of each petitioner's statements against the other petitioners was error.*—If the theory of the majority below be accepted, the

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nation of hostilities in the existing war as proclaimed by the President or by a concurrent resolution of the two houses of Congress. It is evident from the committee reports relating to the 1942 Act that that Act was intended to embrace offenses covered by 18 U. S. C. 582, the general three-year statute of limitations as to criminal offenses. See H. Rep. 2051 and S. Rep. 1544, 77th Cong., 2d sess. See, also, *Miller* v. *United States*, 24 F. 2d 353, 360–361 (C. C. A. 2), certiorari denied, 276 U. S. 638; compare *United States* v. *Noveck*, 271 U. S. 201, 204. It is consequently clear that the prosecution was not out of time even if the conspiracy did not endure beyond the registration period.

[27] Of course, if, as petitioners contend, the conspiracy ended with the filing of the false registration forms, the conspiracy was at an end when the statements were made, and hence they were not admissible against other alleged co-conspirators under the well-settled principle enunciated by this Court in *Logan* v. *United States*, 144 U. S. 263, 308–309, and *Brown* v. *United States*, 150 U. S. 93, 98–99.

object of the conspiracy was not only that petitioners should connive with Draeger and Vogel that they should register falsely, but that they should persist affirmatively thereafter in their deceit and concealment from the Government. In the interrogative process, several years after the registration, both Mayer and Fiswick denied their connection with the Nazi Party and hence asserted in effect that they did not register falsely. Almost immediately, however, they made admissions, written and oral (Fiswick in the same interview and Mayer the next morning), from which the jury could conclude, particularly when considered in the light of the background evidence, that they were parties to a conspiracy with Party leaders to conceal their Party membership or affiliation. When interrogated by the F. B. I. Rudolph immediately admitted his part in the conspiracy by asserting that he had failed to disclose his Party membership when registering upon instruction from a Consulate official. It was not until nearly a year later that Rudolph, in another statement to the F. B. I., retracted his admission that he acted pursuant to instructions when registering falsely.

If continued affirmative maintenance of the plot to deceive was the conspirators' objective, as the majority below thought, then, it would seem to us, that when each petitioner revealed to the

Government information which no longer left it deluded as to him, that petitioner was not furthering the plot but, so far as he was concerned, was terminating, or frustrating, it. He was withdrawing from the plot; he was no longer a partner in crime and hence had ceased to be a conspirator. Therefore, on the agency principle, upon which conspiratorial responsibility is predicated, what he disclosed could not be used against his erstwhile fellow-conspirators, nor could their similar statements for the same reason properly affect him. Revelatory of the part he had played in the scheme, his statements were but narration of past events, utilizable, of course, against him as an admission against interest, but not against those as to whom he had severed the tie of association in crime.

These principles are given expression in several groups of cases: those which hold that the acts or declarations of a conspirator in furtherance of an existing conspiracy bind his fellow conspirators (*Pinkerton* v. *United States,* No. 719, last Term, decided June 10, 1946, slip opinion pp. 5–6; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253–254; *Delaney* v. *United States,* 263 U. S. 586, 590; *Wiborg* v. *United States,* 163 U. S. 632, 657–658; *Clune* v. *United States,* 159 U. S. 590, 593; *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468–469); those which declare that after a conspiracy is ended a conspirator's later

acts or declarations cannot be used against his fellows (*Logan* v. *United States,* 144 U. S. 263, 308–309; *Brown* v. *United States,* 150 U. S. 93, 98–99); and, more immediately, those which rule that a conspirator's statements in the nature of a confession to police authorities are not competent evidence against his co-conspirators (*Gambino* v. *United States,* 108 F. 2d 140, 142–143 (C. C. A. 3); *United States* v. *Corso,* 100 F. 2d 604, 605 (C. C. A. 7); *United States* v. *Lonardo,* 67 F. 2d 883 (C. C. A. 2); *Dowdy* v. *United States,* 46 F. 2d 417, 425 (C. C. A. 4); *Van Dam* v. *United States,* 23 F. 2d 235, 238 (C. C. A. 6); *Hauger* v. *United States,* 173 Fed. 54, 57–58 (C. C. A. 4); *Sorenson* v. *United States,* 143 Fed. 820, 821 (C. C. A. 8)).

The majority below gave to Mayer's and Fiswick's preliminary denials to the F. B. I. that they were connected with the Nazi Party, and to Rudolph's statement and testimony at the trial retracting his earlier statement to the F. B. I. that he falsely registered pursuant to instructions from a Consulate official, a significance which, in our opinion, is without bearing on the question whether the statement of each petitioner was in destruction of his further participation in the conspiracy. Mayer's and Fiswick's denials would seem to be of no significance. They were followed either immediately or almost immediately by an expression of desire to tell the

agents the full truth and by a complete revelation by each of what he had done. They were but the natural expressions of those who did not want to reveal their crimes when confronted by Government investigators. The later statement of Rudolph to the F. B. I. that he lied when he told the agents earlier that he failed to disclose his Party connection pursuant to the direction of a Consulate officer does not obliterate the fact that he did make a revelation of his participation in the plot. It, as well as his retraction on the stand, like the explanations of Mayer and Fiswick when they testified, merely presented matter which the jury was required to weigh in determining whether or not the truth lay in the statements in question.[28]

B. *The error was harmless.*—The question which then arises is whether the judgments of conviction must be reversed because the error of the trial court in instructing the jury in effect that the statements of each petitioner were properly evidential against the other petitioners constituted reversible error.

Under the "harmless error" statute, Section 269 of the Judicial Code, as amended (28 U. S. C.

[28] The same thing, of course, is true of several explanatory letters of Fiswick to the United States Attorney at Trenton, New Jersey, which appear in the record at R. 275–279. They were apparently introduced to make the evidential picture complete (R. 154); they were exculpatory in nature and hence could not have been prejudicial to Fiswick.

391, *supra*, pp. 5–6), an appellate court may not reverse a judgment of conviction for errors "which do not affect the substantial rights of the parties." Construing that statute in *Kotteakos* v. *United States* (Nos. 457 and 458, last Term, decided June 10, 1946), a criminal case in which petitioners had been convicted by a jury, this Court laid down the following test for determining whether error should result in reversal (slip opinion, pp. 10–11):

> If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * *. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Appraising the error in the light of these criteria, we do not believe that there is any basis for real doubt that the error did not substantially

influence the verdict. While holding that reversible error resulted (R. 309), the dissenting judge does not indicate in what respect the admission of the statements of one petitioner against the other two prejudiced the latter. It is evident from his opinion that he does not deny that each statement was properly admitted against the maker (see R. 302, 307, 308, 309). Petitioners contend that the statements were highly prejudicial to the rights of the defendants who did not make them and who could not be bound by them (Br. 33). But the only prejudice which they articulate is that the trial court permitted the statements, taking them together, to be considered by the jury as proof of the existence of the conspiracy and of its continuation down to the date of the filing of the indictment (Br. 34), and that "under the ruling made by the Court, who can say that the jury did not consider them in its search for proof of the existence of the conspiracy charged?" (Br. 33).

However, in the instruction in question (*supra*, pp. 22–23) the trial judge specifically told the jury that "these admissions and statements were not allowed for the purpose of proving the conspiracy itself," but "simply to prove acts and course of conduct which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the

conspiracy".[29] It is thus evident that the trial judge forbade the jury to use the statements as proof of the conspiracy.[30]

Assuming, as petitioners claim, that the jury was permitted to utilize the statements as showing that the conspiracy endured beyond the registration period, although it is not at all clear from

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[29] He had, at the beginning of the instruction, stated that "There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy."

[30] So far as the maker of the statements was concerned, the trial judge could have permitted the utilization against him of his statements for any proper evidential purpose since there was independent proof of the *corpus delicti* (the conspiracy). See footnote 32, p. 52, *infra*. It is well settled in such circumstances that the admissions of a defendant may be considered in connection with the independent proof to establish the defendant's guilt beyond a reasonable doubt. *United States* v. *Di Orio*, 150 F. 2d 938 (C. C. A. 3), certiorari denied, 326 U. S. 771; see *Jordan* v. *United States*, 60 F. 2d 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633; see also *Evans* v. *United States*, 122 F. 2d 461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States*, 94 F. 2d 236, 240 (App. D. C.).

If the statements had been properly admissible against the other conspirators, as the trial judge thought they were, the statements would have been competent evidence for any relevant purpose against those conspirators if there was proof *aliunde* the statements that they were members of the conspiracy. *Glasser* v. *United States*, 315 U. S. 60, 74–75; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249. That there was such proof in this case cannot be doubted. It is found in each petitioner's statements themselves as well as in the independent proof used to establish the *corpus delicti*.

the instruction in question that this was the case, we are unable to perceive that this in and of itself could have prejudiced the petitioners. Whether the conspiracy continued down to the time when the statements were made was important only in relation to the question whether each petitioner's statements could be used against the others.[31] If any prejudice resulted, it obviously arose from that factor alone. Moreover, petitioners themselves state that there are no "admissions in [the statements] of overt acts by the defendants making them, after December, 1940" (Br. 33), when the registration period ended.

The real purpose for the introduction of the statements, as the record indicates, was to show the participation of each petitioner in the conspiracy. The evidential picture before any of the statements were admitted was this: petitioners' names appeared on a list identified by Vogel's secretary, Miss Illian, as a list of the names of the members and prospective members of the Party. In the fall of 1940 letters were sent to the persons on the list directing them to call on Draeger, the local Party leader. A number of such persons appeared and they were told

[31] As we have indicated (footnote 26, pp. 41–42, *supra*), whether the conspiracy continued after the filing of the false registration statements has no bearing in respect of the statute of limitations.

either by Draeger or Vogel that in registering under the Alien Registration Act they should conceal their Party connections. Each petitioner, in registering under the Act, failed to disclose any party connection (*supra*, pp. 11–15). But there was no direct showing that petitioners were among those who had received the instructions. Of the witnesses called by the Government, Miss Illian was in the best position to know this. However, she could not identify Fiswick and another defendant whom she was specifically asked to identify (R. 72–73), and it is probably the fact that she did not know any of the defendants. Manifestly, it was important for the Government, as the prosecutor recognized (R. 48), to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy. This was the state of the record when the question first arose, in connection with Mayer, as to the admissibility of the statements of any of the defendants to the F. B. I. After some colloquy (R. 106–112), the trial judge ruled that Mayer's statements were admissible against him because he concluded that there was independent evidence of the *corpus delicti*—the conspiracy. The trial judge stated, however, that while he thought that there was independent evidence of the conspiracy, the question of participation therein "by individual defendants may be

the subject of further proof" (R. 112).[32] Consequently, it is clear that the statements were introduced merely to establish the participation of each maker in the conspiracy.

Moreover, it is apparent from the statements themselves that each disclosed no more than the participation of its maker in the conspiracy. The statements were in substance identical. Each petitioner in his statements admitted his connection with the Nazi Party and that, in failing to disclose such connection in registering, he had acted pursuant to instructions given by Vogel or some official of the German Consulate (*supra*, pp. 15–19).[33]

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[32] Present counsel for petitioners indicated that he did not disagree with the trial judge's statement of the law, but only with its application (R. 112). He was correct in his concessions that the statements could be used against their maker if there was independent proof of the *corpus delicti* (cf. cases cited in footnote 30, *supra*, p. 49), and that proof of the identity of a perpetrator of a crime is not part of the *corpus delicti*. Cf. *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson* v. *United States*, 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635. Here, there was independent proof not only of the unlawful combination but also of petitioners' participation therein in the form of the list of members and prospective members on which petitioners' names appeared, through testimony by the Government witnesses that Draeger and Vogel had instructed such persons to conceal their connection with the Nazi Party, and in that petitioners did not state any connection with the Party in registering as aliens.

[33] The jury was justified in inferring that this official was, in the light of the other evidence, either Draeger or Vogel.

Since each petitioner admitted his own complicity, there was obviously no occasion for the jury to resort to the similar admissions made by the others. Furthermore, nowhere in the statements of any one petitioner is there a single reference to any other defendant. Under these circumstances, there was nothing in the statements of one petitioner which the jury might reasonably be said to have utilized to establish the participation in the conspiracy of another petitioner. In analogous situations appellate tribunals have declined to reverse convictions. See *United States* v. *Hannon*, 105 F. 2d 390, 391 (C. C. A. 3); *Beard* v. *United States*, 82 F. 2d 837, 842 (App. D. C.), certiorari denied, 298 U. S. 655; *State* v. *Smith*, 33 Nev. 438, 459 (1910); see also *People* v. *Lorraine*, 90 Cal. App. 317, 334 (1928).

In the *Hannon* case, the prosecution showed that when Thomas Hannon, one of the conspirators, was arrested, he said, "Who squawked?" The court said that "the testimony was admissible as to Thomas Hannon and that it could not have affected the rights of any one of the other appellants for the remark implicated Thomas Hannon only." In *Beard* v. *United States*, appellants claimed that it was error to admit against them declarations of other conspirators made after the latter were arrested. It was said that "the declarations, except against the persons making them, were of no importance. There is nothing in them

which connects any other or others of appellants with the alleged conspiracy." In *State* v. *Smith*, the prosecution introduced a statement made by one of the conspirators after his arrest implicating a conspirator other than Smith, the conspirator on trial. Considering the error in the light of the analogous Nevada "harmless error" statute, it was held that the admission of the statement could not have substantially prejudiced Smith since he was not mentioned in the statement.[34]

We submit that under the circumstances of this case the fact that the jury was erroneously permitted to consider statements of one petitioner against the others was harmless since, under the test enunciated by this Court in the *Kotteakos* case, *supra*, it cannot reasonably be said that the error substantially influenced the jury's verdict.

III

QUESTIONS NOW URGED BY PETITIONERS BUT NOT PRESENTED BY THEIR PETITION FOR CERTIORARI

The only question which was presented by the petition for certiorari was whether it was reversible error for the trial judge to permit the jury to use the statements of one petitioner against the others. In their brief on the merits

[34] In each of the cases cited at p. 45, *supra*, holding that a conspirator's confession to the authorities is incompetent evidence against his fellow conspirators, the confession implicated another conspirator.

petitioners have raised additional questions. Rule 38 of this Court provides that "Only questions specifically brought forward by the petition for writ of certiorari will be considered." See *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–178; *National Licorice Company* v. *Labor Board*, 309 U. S. 350, 357. While we discuss the additional questions, none of them, we think, possesses any merit, and several, at least, are of a character which would not warrant further review on certiorari.

A. Petitioners *contend* (Br. 21–25) that "there is an utter failure of proof of any conspiracy." They seem to argue that there could be no proof of any conspiracy between Draeger and Vogel because the relationship which existed between them was that of master and servant and that Vogel simply carried out instructions given to him by Draeger; that even assuming that each defendant intended to register falsely, the evidence presented only the picture of each one coming to the Consulate on his own initiative to secure information as to how he should register; and that there is no proof of the purpose Draeger and Vogel had in mind with respect to the instructions which they issued to registrants.

Of course, the fact that Vogel may have been a subordinate of Draeger would not preclude a conspiracy between them, provided the necessary elements were present. *Hyde* v. *United States*,

225 U. S. 347, 368.[35] Viewing in the light most favorable to the Government the evidence summarized in the Statement, *supra* (*Glasser* v. *United States*, 315 U. S. 60, 80), there can be no doubt that the jury was warranted in concluding that Draeger and Vogel planned that Party adherents should conceal their Party connection when registering under the Alien Registration Act; that pursuant to this plan Draeger, the leader of the Party in New York City, issued directions to its adherents to appear at the Party headquarters so that they could instruct them to conceal their Party connection in registering; and that, in complete obedience to the leadership principle of the Party, petitioners did appear at the Party headquarters, did receive instructions, and did register as directed, under circumstances which make it clear that they became parties to the plan and knew that they were registering falsely.

Furthermore, this Court has held that where, as here, the probative sufficiency of the evidence has the support of the district court (in which is included the verdict of the jury) and of the circuit court of appeals,[36] it will not ordinarily reexamine the question. *United States* v. *Johnson*, 319 U. S. 503, 518. There is nothing in this

[35] The jury was instructed to this effect (R. 239).

[36] See the majority opinion (R. 301). The dissenting judge did not question the sufficiency of the evidence to establish a conspiracy.

case, we submit, to warrant a departure from this rule.

B. Petitioners also contend (Br. 39–43) that there was no proof that they intentionally falsified when they filed their alien registration forms. They assert that the form, particularly when it is considered in the light of the accompanying instructions that were issued to registrants, did not make it clear that a registrant was required to disclose his connection with the Nazi Party in this country where, as in the case of these petitioners, he was merely an applicant for membership. Aside from the fact that there are decisions to the effect that mere applicants for membership in the Party were required to disclose that fact in registering,[37] petitioners' argument is in disregard of the theory upon which this case was presented to the jury. In his charge to the jury the trial judge stated (R. 241):

> There was evidence on the part of the defendants of a difference in so-called membership, which you have the right to consider in weighing the intent of these individuals—the reasons animating them which might modify their intent. There was, for instance, the alleged application for membership, as distinguished from the membership. Whether or not that was

[37] *United States* v. *Ausmeier*, 152 F. 2d 349, 355–356 (C. C. A. 2); *United States* v. *Dawe*, 149 F. 2d 491 (C. C. A. 2); *United States* v. *Koeniger*, 149 F. 2d 492 (C. C. A. 2), certiorari denied, 326 U. S. 725.

> simply a front or whether it was an actuality is for you to determine, and to your finding you will give such weight as you think it merits.

There was nothing in the charge which advised the jury that they, nevertheless, could convict even though a defendant was merely an applicant for membership on the theory that the form required the disclosure of such a connection with the Party. It is evident, therefore, that the jury must have concluded, under the evidence, that there was no real differentiation between applicants and members. The evidence clearly justified that conclusion.[38]

C. In Point IV of their brief, the heading of which (Br. 43) indicates that it is, like Point II (Br. 26), devoted to the question of the admissibility of each petitioner's F. B. I. statements against the other two, petitioners quote at length

[38] As appears from the Statement, pp. 10–11, *supra*, applicants for membership began to pay dues immediately upon filing their applications, and the dues were the same as for full members; they were, like full members, invited to functions by Draeger, the Party leader; and they were, along with full members, directed to appear at Party headquarters, and while there, were given instructions as to how to register. Furthermore, when Mayer and Fiswick were first interrogated by the F. B. I. about membership they first denied membership and then stated that they wanted to tell the truth. Each then said that he was an applicant for membership. We think the jury was entitled to infer from this that these petitioners never thought that there was any real distinction between applicants and full members.

(Br. 45–48) from that portion of the dissenting opinion below which deals with the question whether the trial judge in his instructions to the jury, used language which might be deemed to have taken from the jury the determination of the issue whether there was a conspiracy, and thus invaded the jury's province (see R. 305–308). The point is fully discussed in the majority opinion below and demonstrated to be without merit (R. 296–298). We, therefore feel that extended comment is unnecessary. We do not believe that there can be any doubt, from the instructions involved and from the charge as a whole, that the jury clearly understood that it was its function to decide whether a conspiracy existed; the dissenting judge was, we think, unduly concerned with nicety of language.

D. Finally, petitioners assert (Br. 49–51) that the trial judge refused certain requests for proper instructions, the subject matter of which was not sufficiently covered in his charge, but they make no endeavor to support their assertion by any analysis of the charge. It seems to us that in these circumstances it is hardly incumbent upon this Court to give consideration to the point. However, it may be observed that all of the refused requested instructions quoted by petitioners related either to the question of the defendants' good faith in registering or to the question of

their participation in the conspiracy. These matters were, we submit, adequately dealt with in the charge (see R. 237–239, 240, 241–242).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be dismissed as to petitioner Fiswick, and that the judgment below should be affirmed as to petitioners Mayer and Rudolph.

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SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1946.

Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, Petitioners,
v.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The Alien Registration Act of 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*, required aliens, with certain exceptions, to register pursuant to regulations of the Commissioner of Immigration and Naturalization.[1] Among the disclosures required was whether during the preceding five years the alien had been "affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."[2]

Petitioners are German nationals who registered under the Act, the last of the three, Mayer, registering on December 23, 1940. Each stated when he registered that he was not affiliated with or active in such an organization. Each failed to disclose in answer to another question pertaining to "memberships or activities in clubs, organizations, or societies" that he was in any way connected with the Nazi party. They were indicted in 1944 with 28 others for conspiring to defraud the United States in the exercise of its governmental functions (see *Curley* v. *United States*, 130 Fed. 1, 4) in violation of § 37 of the Criminal Code, 18 U. S. C. § 88.

[1] See 5 Fed. Reg. 2836 for the regulations.

[2] Regulations, *supra*, note 1, § 29.4 (l) (15).

The indictment charges that petitioners continuously between September 1, 1939, and the date the indictment was returned, September 13, 1944, conspired with each other and with Draeger, the German consul in New York City and leader of the Nazi party in this country, with Draeger's secretary, Vogel, and with other representatives of the Third Reich, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. It charges that since 1933 the Nazi party was devoted to furthering the political activities and policy of the German Reich in this country, that each petitioner during the five years prior to his registration was a member of that party, that Draeger and Vogel directed petitioners in registering under the Act to conceal and falsify their connection with the Nazi party, that petitioners followed such directions, that after their registration they continued from day to day to misrepresent to the government their connection with and activities in the Nazi party. The indictment alleges that as a means of accomplishing the conspiracy the petitioners appeared for registration and in registering falsely failed to disclose their connection with and activities in the Nazi party. The indictment sets forth forty overt acts. Many related to instructions given by Draeger and Vogel to various defendants from September to December 1940, in connection with their registration. Others related to the registering by petitioners in November and December, 1940. The last overt act alleged to have been committed by any of petitioners was the filing by Mayer of his registration statement on December 23, 1940.

Of the 31 indicted, only the three petitioners were convicted after a jury trial.[3] Fiswick and Rudolph were sentenced to imprisonment for eighteen months each. Mayer

[3] Six entered pleas of guilty. There was a dismissal as to one, a severance as to fourteen. Ten were tried. The jury acquitted three and disagreed as to the other four.

was sentenced to imprisonment for a year and a day. The judgments of conviction were affirmed by the Circuit Court of Appeals, one judge dissenting. 153 F. 2d 176. The case is here on a petition for a writ of certiorari which we granted because the rulings of the lower courts on the continuing nature of the conspiracy were apparently in conflict with decisions of this Court. See *United States* v. *Irvine*, 98 U. S. 450; *United States* v. *Kissel*, 218 U. S. 601.

First. The nature and duration of the conspiracy assumed great importance at the trial for the following reason. Each petitioner after he was apprehended made damaging statements to agents of the Federal Bureau of Investigation. Mayer, in November, 1943, stated that he had applied for membership in the Nazi party and had not disclosed the fact because Vogel told him not to. Fiswick's statement made in April, 1944, was to the same effect. Rudolph made substantially the same admissions in November, 1943, and then in September, 1944, retracted them insofar as he had said that in registering under the Act and in failing to disclose his Nazi party affiliation he had followed instructions. His later reason for non-disclosure was his asserted desire to protect his family. Each of these statements was admitted at the trial. At first, each was admitted only as against the maker. At the close of the government's case, however, the District Court ruled that each of these statements was admissible against each of the other co-conspirators. It so charged the jury. Later the jury returned to the courtroom for further instructions. One of the questions on which the foreman stated that they desired instruction related to that part of the charge "where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals." The judge then repeated that the admissions of each were admissible against all provided there was a conspiracy and they were all in it.

The Solicitor General now rightly concedes that that ruling was erroneous. Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See *United States* v. *Irvine*, *supra*. Continuity of action to produce the unlawful result, or as stated in *United States* v. *Kissel*, *supra*, p. 607, "continuous cooperation of the conspirators to keep it up" is necessary. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. Under § 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to complete the offense.[4] The statute of limitations, unless suspended,[5] runs from the last overt act during the existence of the conspiracy. *Brown* v. *Elliott*, 225 U. S. 392, 401. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.

In this case the last overt act, as we have noted, was the filing by Mayer of his registration statement on December 23, 1940. That act was adequate as an overt act in furtherance of a conspiracy to make a false return. But there is difficulty in also making it serve the function of an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made. All continuity of action ended with the last overt act in December, 1940. There was no overt act of concealment which followed the act of making false statements. If the latter is permitted to do double duty, then

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[4] At common law it was not necessary to aver or prove an overt act. See *Hyde* v. *United States*, 225 U. S. 347, 359. The same is true under the Sherman Act. *Nash* v. *United States*, 229 U. S. 373, 378; *United States* v. *Socony-Vacuum Oil Co.*, *supra*, p. 252. But § 37 of the Criminal Code requires not only an agreement to do the unlawful act but also the doing of "any act to effect the object of the conspiracy". See *Hyde* v. *United States*, *supra*, p. 359.

[5] See, for example, § 1 of the Act of August 24, 1942, 56 Stat. 747, 18 U. S. C. Supp. II, § 590*a*, as amended by § 19 (b) of the Act of July 1, 1944, 58 Stat. 649, 667, 18 U. S. C. Supp. IV, § 590*a*.

a continuing result becomes a continuing conspiracy. If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others. While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States*, 328 U. S. —, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*, 150 U. S. 93, 98. Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. *Gambino* v. *United States*, 108 F. 2d 140, 142–143.

It is earnestly argued, however, that the error was harmless. The "harmless error" statute (Judicial Code § 269, 28 U. S. C. § 391) provides that "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." We have recently reviewed the history of this statute and the function it was designed to serve in criminal cases. *Kotteakos* v. *United States*, 328 U. S. —. The Court there stated, p. —:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but

very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners. It is not enough to say that there may be a strong case made out against each petitioner. The indictment charges a conspiracy, not the substantive crime of falsely registering. The evidence that petitioners conspired with each other and with Draeger, Vogel, and others, is not strong. Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster.

The prosecutor's case, apart from the admissions, may be briefly summarized. Draeger and Vogel were active in the affairs of the Nazi party in this country. Their stenographer a government witness, testified that applications for membership in the party were received at their office. Dues were paid there. A card file of members of the party and of applicants for membership was kept there. The name of each petitioner was on the list. A letter was sent to all on the list in August or September, 1940, over Draeger's signature, requesting them to discuss a matter with Draeger. Those who appeared in response to the letter were told to conceal their Nazi party membership or affiliation when they registered under the Act. Another

witness for the government—a defendant in the case who was granted a severance—also testified that Vogel gave instructions to party members not to disclose their affiliation with the Nazi party. And a clerk in Draeger's office testified for the government that the party members who came to the consulate were told to say in their registration statement that they were members of an innocuous sounding association of German nationals. There was no evidence that petitioners came to the consulate seeking advice. There was no *direct* evidence that petitioners had received the instructions from the consulate to conceal their party membership. There was no *direct* evidence that petitioners came to the consulate in response to the letter which was sent. They were not identified as being with any group which called there. There was no evidence that they conferred with Draeger or Vogel or with each other.

The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor "to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy." The admissions served that purpose. They supplied the first direct evidence that petitioners acted pursuant to the instructions of the consulate. It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admis-

sions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos* v. *United States, supra.* With the admissions the charge of conspiracy received powerful reinforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. The admissions apparently became of considerable importance in the deliberations of the jury, for, as we have noted, they asked for clarification of the instructions on that point. And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the "harmless error" statute. The use made of the admissions at the trial constituted reversible error.

Second. A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and that the writ of certiorari should be dismissed as to him. We followed that procedure in *St. Pierre* v. *United States*, 319 U. S. 41, 42, saying that since the sentence had been served, "there was no longer a subject matter on which the judgment of this Court could operate." We added, however, that the petitioner had not shown that "under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." P. 43.

The situation here is different. Fiswick is an alien. An alien sentenced to imprisonment for one year or more "because of conviction in this country of a crime involving moral turpitude" is, unless pardoned, subject to deportation if the crime was committed within five years after

the alien's entry into the United States. 39 Stat. 874, 889, 8 U. S. C. § 155. The conspiracy with which Fiswick is charged was formed and executed within that five year period, as his last entry was in 1937. The conspiracy of which he was convicted was one to impede the government in one of its lawful functions, to prevent it from obtaining information which the Executive and Congress deemed vital to our internal security, to conceal by fraud, deceit, and perjury [6] the ramifications of an organization in our midst bent on our undoing. We need not determine in this collateral way whether conviction for such a crime would involve "moral turpitude" within the meaning of the deportation laws.[7] But the judgment, if undisturbed, stands as unimpeachable evidence that Fiswick committed the crime charged. The hazards of deportation because of that fact are real.[8] To leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve "moral turpitude" is to add to his burdens by depriving him of his best defense—that he was not properly convicted.

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[6] The registration statements required by the Act were sworn statements. Regulations, *supra* note 1, § 29.4 (g), (j).

[7] Convictions for perjury, *Kaneda* v. *United States*, 278 F. 694, for frauds on the revenues, *Guarneri* v. *Kessler*, 98 F. 2d 580, *United States* v. *Reimer*, 113 F. 2d 429, for frauds with respect to property, *United States* v. *Burmaster*, 24 F. 2d 57, have been held by the lower courts to meet that test. And counterfeiting was so classified by the Court in *United States* v. *Smith*, 289 U. S. 422. As to deportation for violations of the Alien Registration Act of 1940 see § 20 (b) (4) and (5). See also Alien Enemy Act of 1798, Rev. Stat. 4067–4070, as amended 40 Stat. 531, 50 U. S. C. §§ 21–24; Presidential Proclamation No. 2655, 10 Fed. Reg. 8947.

[8] Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. *Bridges* v. *Wixon*, 326 U. S. 135, 147. As stated by the Court, speaking through Mr. Justice Brandeis, in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss "of all that makes life worth living."

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss this case as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he "has been and still is a person of good moral character." 54 Stat. 1137, 1142, 8 U. S. C. § 707 (a) (3). An outstanding judgment of conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse. And even though he succeeded in being naturalized, he would, unless pardoned, carry through life the disability of a felon;[9] and by reason of that fact he might lose certain civil rights.[10] Thus Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

It is said, however, that having served his sentence, Fiswick may not be resentenced on a new trial and that if his conviction is reversed, he thereby escapes deportation. The argument is that he thwarts the deportation policy by electing to serve his sentence. We cannot assume, however, that Fiswick is guilty of the conspiracy charged. He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but

[9] "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." Criminal Code § 335, 18 U. S. C. § 541.

[10] Thus Mo. Rev. Stats. Ann. § 4561 renders such person incompetent to serve on a jury and forever disqualifies him from voting or holding office, unless pardoned.

not yet shown to have committed it. To dismiss his case as moot would permit the government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement.

Reversed.